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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 193.

VERLIN BAXTER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Verlin Baxter prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 4, 1961. An order was entered in this Court by Mr. Justice Potter Stewart, extending the time for the filing of this petition through July 3, 1961.

OPINION BELOW.

The District Court did not render a written opinion. The decision and judgment of the Court of Appeals for the Sixth Circuit are annexed hereto as an Appendix, on page A1.

JURISDICTION.

The judgment of this Court is invoked under 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED.

(1) Is there substantial evidence to support the verdict of the jury and the judgment of the United States District Court based thereon?

(2) Was it error for the United States District Court to admit, over the objection of defense counsel, and refuse to strike on motion of defense counsel, evidence pertaining to the sale or carrying off of oil, oil burners, isopropyl alcohol, cow and calf bran, or feed?

(3) Was it error for the United States District Court to permit Government counsel to interrogate petitioner on cross-examination, over the objection of defense counsel, concerning immaterial and irrelevant matters prejudicial to petitioner and not pertinent to the issues?

(4) Did the District Court err in refusing to charge the jury as follows:

"Gentlemen of the jury:

"I charge you that in this case the defendant is charged solely with violation of Title 26, U.S.C.A., Sec-

tions 5213(a), and 5609, in that he is alleged to have sold on April 30, 1958, 840 pounds of sugar, and on May 27, 1958, 300 pounds of sugar, and on March 31, 1959, 500 pounds of sugar, and wilfully and unlawfully failing to render a correct return to the Assistant Regional Commissioner, Alcohol & Tobacco Tax Division. In this cause you are concerned only with whether the defendant sold 25 pounds or more of sugar without making that report. You are not in anywise concerned with anything else in this case. I instruct you that all of the testimony pertaining to Jersey Cream feed, the oil burners, and the purchase of oil, is immaterial and impertinent to the issues in this case, and you will, therefore, disregard any and all testimony pertaining thereto. The sole issue is whether the defendant on the occasions mentioned in the indictment sold more than 25 pounds of sugar to one person, and wilfully and unlawfully failed to make a return showing such sale." (265a)

(5) Was it error for the District Court to refuse to charge defendant's special request as follows:

"In this case the burden is on the Government to prove that the bags they say were seen by the Government officers contain 25 pounds or more of sugar, and this must be proved beyond a reasonable doubt before there can be a conviction of the defendant." (266a)

(6) Did the District Court coerce the verdict in this case?

STATUTES INVOLVED.

Title 18, U.S.C.A., Section 5213(a).

STATEMENT.

Petitioner was charged in a Four Count indictment with a violation of Title 26. U.S.C.A., Section 5213(a), in that he allegedly disposed of more than 25 pounds of sugar at his grocery store without making a return in writing to the United States Treasury Department of such alleged disposal, after he had been required to do so by the Treasury Department in a letter to him dated May 29, 1957.

At the conclusion of the evidence the Government was required to elect which counts of the indictment it would proceed upon, in view of the fact that the Fourth Count embraced the charges set forth in the other three counts. The Government elected to proceed on grounds 1, 2 and 3, and dismiss the fourth.

Motions for a verdict of acquittal made at the conclusion of the Government's evidence and at the conclusion of all the evidence were overruled.

The jury, after long deliberation and numerous instructions from the Court, as will be detailed later herein, found petitioner guilty on Count Two only, and not guilty on Counts One and Three.

The Court imposed a sentence of imprisonment for a period of six months, and petitioner is enlarged upon bail.

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals for the Sixth Circuit erred in holding:

(1) There was substantial evidence to support the verdict of the jury and the judgment of the District Court based thereon.

(2) It was not error for the District Court to admit and refuse to strike evidence pertaining to the sale or carrying off of oil, oil burners, isopropyl alcohol, cow and calf bran or feed.

(3) It was not error to permit the Government to interrogate petitioner on cross-examination regarding immaterial and irrelevant matters, and matters prejudicial to petitioner and not pertinent to the issues.

(4) It was not error for the District Court to refuse to charge defendant's special request No. 1, which is quoted hereinbefore under the topic, "Questions Presented", Number (4).

(5) It was not error for the District Court to refuse to charge petitioner's special request No. 2, which was quoted hereinbefore under the topic, "Questions Presented," No. (5).

(6) That the District Court did not coerce the verdict in this case.

REASONS FOR GRANTING WRIT.

The questions here presented are substantial ones in that the conduct of this trial constituted an absolute deviation from all federal procedure, thus depriving the petitioner of a fair and impartial trial. Petitioner's conviction was upon the basis that because he sold from his grocery store materials which could be used in the manufacturing of illicit distilled spirits, such as fruit jars, kerosene, calf bran and feed he was guilty of disposing of more than 25 pounds of sugar. The errors committed by the trial court were grievous ones and could have had no more effect than to prejudice petitioner before the jury. In view of the mass of irrelevant and immaterial matters

presented by the Government, the jury undoubtedly based its verdict on the prejudice thus created.

Specification of Error No. (1). The only pertinent testimony in this case is that pertaining to Count Two of the indictment. This count charges that petitioner on May 27, 1958, disposed of more than 25 pounds of sugar. The only testimony pertaining to this count is that of Federal Officer Tubb. He stated that from a point 75 yards away, in a wooded area, using binoculars, he saw three bags labeled "Godchaux" sugar removed from petitioner's store. On cross-examination he was asked this question, and made this answer:

> "Q. Of course, unless, and I don't want to belabor it any further, I want to ask it one time, are you telling the Court and jury it was sugar or wasn't sugar?
> "A. I can't say positively it was or was not sugar."

It is this testimony upon which the Government relied for a conviction in this case (94a-96a).

Specification of Error No. 2. It will make this document too voluminous to repeat the immaterial, irrelevant and prejudicial testimony that the District Court admitted in this case. We cite this Court these instances, as follows: 64a, 65a, 66a, 67a, 68a, 72a, 73a, 74a, 76a, 77a, 80a, 82a, 107a, 112a, 113a, 127a, 161a, 209a, 212a, 213a, 214a, and 215a. Objections to this irrelevant, prejudicial and immaterial matter were properly made by defense counsel. Objections set forth pertained to the testimony concerning the sale or possession by petitioner of isopropyl alcohol, Jersey Cream feed, kerosene, half-gallon fruit jars, oil burners, calf bran, the manner in which a distillery is operated, how an oil burner is constructed, the reputation of the Cosby section of Cocke County for the manufacture of illicit spirits, the distance between the Cosby section and

petitioner's store, why isopropyl alcohol is used in the "moonshine" business. All of this testimony was wholly immaterial, irrelevant and prejudicial to petitioner in that he was only charged with disposing of 25 pounds or more of sugar, and the testimony tended to confuse the jury as to the issues in the case.

Defense counsel in the trial not only called this irrelevant and immaterial matter to the attention of the District Court by objections, but at the conclusion of all the evidence moved to strike the testimony, which motion was overruled, and made a special request at the conclusion of the Court's charge to try to cure the prejudicial error, which request was refused (231a).

In *Bollenbach* v. *U. S.*, 326 U.S. 607, at 406, the Court points out:

> "* * * the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

In the *Bollenbach* case, the government insisted that the defendant was guilty as shown by the record and that the errors were technical ones not affecting the substantial rights of the parties and should be disregarded. This Court struck down such argument by using the following verbiage:

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. * * *"

In the instant case the objections were not technical. They went to the very heart of the lawsuit in an effort to keep the minds of the jury on the right track insofar as

the issues involved and not leave the jury to wander in utter confusion through a labyrinth of collateral matter. Under the procedure followed by the District Court in the instant case, petitioner was tried on several charges not set forth in the indictment.

Specification of Error No. 3. The petitioner testified in his own behalf, and the Court permitted government counsel, over objections, to interrogate him concerning the sale from his grocery store of fruit jars, cow and calf bran, fuel oil and isopropyl alcohol. The same reasoning applies to this specification as applies to the one immediately above.

In *Gideon* v. *U. S.*, (C.C.A. 8) 52 F.2d 427, at 430, the Court said:

> "* * * that whatever may have been the purpose of the cross-examination referred to, the effect was highly prejudicial to defendant. It had no tendency to prove the charge against him, but was calculated simply to degrade him in the eyes of the jury."

The immaterial, irrelevant and prejudicial matters about which petitioner was cross-examined in the instant case had the same effect and was not pertinent to the issues.

In the *Gideon* case the Court quotes from *Allen* v. *United States*, 115 Fed. 3, and in the *Allen* case it quotes from *State* v. *Lapage*, 57 N.H. 245, language which we deem pertinent here:

> "'"It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless."'"

Specification of Error No. 4. The argument set forth above with respect to Specifications of Error Nos. 2 and 3, apply equally to this question. By making this special request, defense counsel in a last desperate effort tried to get the District Court to instruct the jury what the issues were for them to decide, and to remove from their minds all of the collateral issues which had been raised and all of the immaterial and irrelevant testimony which had been admitted, and to also present succinctly to the jury the theory of this petitioner. Where a defendant in a criminal case presents a theory supported by the evidence, and the court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory. See *Colbert* v. *United States*, (C.C.A., D.C.) 146 F.2d 10; *Morris* v. *United States*, (C.C.A. 9) 156 F.2d 525; *Marson* v. *United States*, 203 F.2d 904, 912; *Smith* v. *United States*, 230 F.2d 935, 939; 53 Am. Jur., Secs. 540, 432.

Specification of Error No. 5. The special request with which this specification of error is concerned, was made so as to pin-point the issue in the case and call to the jury's attention the fact that there was no testimony given by any witness that could say on his oath that he saw sugar taken from petitioner's store on any occasion. This was the only issue in the case. The failure to charge this special request left it to the jury to indulge in conjecture and surmise about what was contained in the bags which Federal Officer Tubb claims he saw removed from petitioner's grocery store. The same law applies to this special request as that set forth in the specification of error immediately above. To show how prejudicial it was for the Court not to charge this special request, it is called to the attention of this Court that after the jury had deliberated for some time the jury came in the courtroom and asked the Court as follows:

> "THE JUROR: When you stated in your charge to the jury, you know, and you pointed to the sack of sugar, did you state that we did not have to be absolutely sure that it was sugar in that sack?"

In effect, the juror was asking the District Court if they were permitted to guess about the matter or enter the realm of conjecture as to the guilt of petitioner. The Court did not answer this question directly (250a). Defense counsel then requested the Court to charge the jury in accordance with what the juror wanted to know, and to charge the jury that the burden is on the government to prove beyond a reasonable doubt that sugar was in those bags. The Court denied this special request (256a). The District Court absolutely ignored the question asked by this juror. See *Bollenbach* v. *United States*, *supra*, *Thomas* v. *United States*, (C.C.A. 6) 151 F.2d 183. As pointed out in the *Bollenbach* case, a conviction ought not to rest on an equivocal direction to the jury on a basic issue. The question asked by the juror went to the only issue in the case, and the Court was equivocal in its direction to the jury on this basic issue.

Specification of Error No. 6. The jury first received this case at 11:50 a.m. on June 2, 1960. It went to lunch at 12:02 p.m., and reconvened at 1:45 p.m., and returned into court at 2:30 p.m., when the foreman announced they could not agree. At this time the Court emphasized that some jury had to try the case, and in effect told the jury that some jury had to reach an agreement. The jury retired at 3:04 p.m., for further consideration of their verdict, and reported at 4:15 p.m., when the foreman again stated that they could not agree (256a). The Court then asked the foreman if he thought they could agree if they were released to return the next day, and the foreman then replied:

"Judge, I don't think so." (258a)

The Court again emphasized to the jury that if they did not agree some other jury would have to try the case and do the same thing over, and presented to the jury a picture that this would be an awful and practically intolerable thing to have happen. The foreman then again stated that he did not think there was a reasonable possibility of the jury agreeing. The Court then instructed the jury that in a large proportion of cases absolute certainty cannot be expected (258a); and without knowing how the jury was divided numerically, the Court stated that a dissenting juror should consider whether his doubt was a reasonable one since it made no impression upon the minds of so many others of the jury who were just as honest and intelligent as the dissenting juror. The Court thus assumed that one juror was keeping the jury from agreeing. The Court then instructed them that a juror should distrust his own judgment if a large majority of the jury was taking a different view of the case, and that a minority of the jury should introspect themselves and ask whether they might not reasonably doubt the correctness of their judgment since a majority was against them. The Court then sent the jury back for deliberations at 4:22 p.m. Objection was made by defense counsel that the Court was coercing a verdict (260a).

The jury returned into court at 5:03 p.m., and stated again that they could not agree and wanted to go home. They were released until the following morning when they commenced deliberations at 9:14 a.m., and reached a verdict at 10:10 a.m.

With the jury so hopelessly disagreed on the evening of June 2, 1960, and so readily agreeing after short deliberation on June 3, and their finding of guilt only on the Second

Count and not guilty on the First and Third Counts, their verdict was certainly a compromise one induced by the coercion of the Court in being so determined to have the jury agree on something. It is obvious from what the Court did that the jury received the impression that the Court wanted an agreement on something.

In *Bollenbach* v. *United States, supra,* at 405, this Court held:

> "An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming."

The *Bollenbach* case quotes from *Starr* v. *United States,* 153 U.S. 614, as follows:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' * * * and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word."

See *Chicago & E. I. Ry. Co.* v. *Sellars,* (C.C.A. 8) 5 F.2d 31. See also *Gideon* v. *United States, supra,* at 431.

It is permissible for the trial court to assist the jury in its duty, but it is submitted that in the instant case the District Court went much further than was permissible, and that the District Court's action coerced a verdict in this case.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted.

WILLIAM EARL BADGETT,
608 Bank of Knoxville Building,
Knoxville, Tennessee.
Counsel for Petitioner.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JUDGMENT.

May 4, 1961.

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Shackelford Miller, Jr.,
Chief Judge.

No. 14,385

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VERLIN BAXTER, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division.

Decided May 4, 1961.

Before: MILLER, Chief Judge, SIMONS, Senior Circuit Judge, and MARTIN, Circuit Judge.

PER CURIAM. Appellant was found guilty by verdict of a jury of disposing of a substance of the character used in the manufacture of distilled spirits, namely, 300 pounds of sugar, and wilfully and unlawfully failing to render to the Assistant Regional Commissioner, Alcohol and Tobacco Tax Division, a correct return of such disposition, in violation of the provisions of Section 5213(a), Title 26, U.S. Code, and the regulations prescribed thereunder by the Secretary of the Treasury or his delegate. He was sentenced to six months imprisonment.

The constitutionality of the regulation has been previously upheld by this Court. *Di Santo* v. *United States*, 93 F.2d 948, C.A. 6th, cert. denied 303 U.S. 662. See also: *United States* v. *Tishman*, 99 F.2d 951, C.A. 7th, cert. denied 306 U.S. 636.

It is admitted by appellant that no report was made by him of the transaction relied upon by the Government,

but it is contended that the Government's evidence failed to show that the bag which was loaded from appellant's storeroom into the trunk of an automobile, which constituted the transaction under consideration, contained sugar. There was no direct evidence that it contained sugar, or what it contained, but we are of the opinion that the circumstantial evidence introduced by the Government was sufficient to take the case to the jury and to support the verdict. Circumstantial evidence, if strong enough to convince a jury of defendant's guilt beyond a reasonable doubt, is sufficient to sustain a verdict. *Holland* v. *United States*, 348 U.S. 121, 139-140; *United States* v. *Comer*, F.2d , C.A. 6th, decided March 6, 1961.

We find no prejudicial error in the admission of certain evidence, complained of by appellant. Nor were the instructions considered in their entirety, such as to improperly cause the jurors to return a verdict of guilty. *Allen* v. *United States*, 164 U.S. 492, 501; *Logsdon* v. *United States*, 253 F.2d 12, 15-16, C.A. 6th.

The judgment is affirmed.